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January 9, 2009

OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case:	Personnel Security Hearing
Date of Filing:	August 8, 2008
Case Number:	TSO-0664

This Decision concerns the eligibility of XXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As set forth below, it is my decision, based on the evidence and testimony presented in this proceeding, that the individual's access authorization should not be restored at this time.¹

I. Background

The individual has been employed by a contractor since 1991, and held an access authorization ("security clearance" or "clearance") since 1992 as a condition of his employment. In 1991, the individual completed a Questionnaire for Sensitive Positions (QSP) at the request of his employer. In response to a QSP question asking whether he had been arrested in the past five years or had used drugs in the past five years, the individual answered "no." DOE granted the individual a clearance in 1992. During periodic re-investigations in 1995, 1996, and 2006, the individual continued to certify in his security questionnaires that he had never been arrested and that he had never used drugs. However, during the most recent re-investigation, DOE discovered that the individual had been arrested in 1986 on a drug-related charge. In October 2007, the local security office (LSO) sent the individual a Letter of Interrogatory (LOI) requesting further information about the arrest. In a written response, the individual admitted the arrest but he again denied ever using drugs. The LSO conducted a personnel security interview (PSI) with the individual in January 2008, but that interview did not resolve the security concerns arising from the discrepant information provided by the individual. In March 2008, DOE suspended the individual's clearance.

In July 2008, the LSO informed the individual how to proceed to resolve the derogatory information that had created a doubt regarding his continued eligibility for access authorization. Notification Letter (February 12, 2008). The Notification Letter stated that the

¹ Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

derogatory information regarding the individual falls within the purview of 10 C.F.R. § 710.8 (f) (Criterion F).

Criterion F refers to information that a person “[d]eliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire, a Questionnaire for Sensitive National Security Positions, a personnel qualifications statement, a personnel security interview, written or oral statements made in response to official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization, or proceedings conducted pursuant to § 710.20 thru 710.30.” 10 C.F.R. § 710.8 (f). DOE invoked this criterion based on information that the individual had provided in various questionnaires completed regarding his eligibility for access authorization over a 16-year period; specifically in August 1991, May 1995, August 1996, December 2006, and October 2007. In these questionnaires, the individual provided false information when he denied ever using drugs and denied that he was ever arrested. The derogatory information also includes statements on a January 2008 PSI where the individual admitted that he had deliberately falsified his earlier responses.

In a letter to DOE Personnel Security on July 22, 2008, the individual exercised his right under Part 710 to request a hearing in this matter. 10 C.F.R. § 710.21(b). The Director of OHA appointed me as Hearing Officer in this case. After conferring with the individual and the appointed DOE counsel, 10 C.F.R. § 710.24, I set a hearing date. At the hearing, the individual, who was represented by counsel, testified on his own behalf and elected to call three other witnesses. DOE counsel called no witnesses. The transcript taken at the hearing shall be hereinafter cited as “Tr.” Various documents that were submitted by the parties during this proceeding constitute exhibits to the hearing transcript and shall be cited as “Ex.” DOE exhibits are numbered, and the individual’s exhibits are lettered.

II. Analysis

The applicable regulations state that “[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.7(a). Although it is impossible to predict with absolute certainty an individual’s future behavior, as the Hearing Officer I am directed to make a predictive assessment. There is a strong presumption against the granting or restoring of a security clearance. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) (“clearly consistent with the national interest” standard for the granting of security clearances indicates “that security determinations should err, if they must, on the side of denials”); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

I have thoroughly considered the record of this proceeding, including the submissions of the parties, the evidence presented and the testimony of the witnesses at the hearing convened in this matter. In resolving the question of the individual’s eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c): the nature, extent, and seriousness of the conduct; the circumstances

surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the voluntariness of the participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuance or recurrence; and other relevant and material factors. After due deliberation, I find that the individual's access authorization should not be restored at this time because I cannot conclude that such a restoration would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this determination are discussed below.

A. Findings of Fact

The individual first used cocaine as a college student in 1982. Ex. 12 (PSI) at 20. He then used cocaine approximately 25 times between December 1984 and August 1987. *Id.* at 21; Ex. 11 at 1. One night in August 1987, the individual used some cocaine at a friend's house prior to leaving the residence for a restaurant. PSI at 5, 19. While sitting in a car in the restaurant parking lot, the individual was arrested for "Being Under the Influence of a Controlled Substance." *Id.* at 5-8.² He was fined approximately \$200, ordered to attend a diversion program, and put on probation. *Id.* at 13-14. According to the individual, courthouse personnel told him that his arrest record would be expunged after he completed the diversion program. He completed the program successfully.

In 1991, the individual's first wife enrolled in graduate school in a distant state, leaving the individual and his young son behind in their home state. In an effort to reunite his family, the individual applied for a job with a DOE contractor located in the state where his wife resided. According to the individual, when he requested a copy of his police record, the document that the local police department sent him did not have any criminal charges. Tr. at 72. As part of the application process, the individual completed a QSP. Ex. 7. On the QSP, he indicated that he had never been arrested for an alcohol or drug-related offense and that he had not used any illegal drug within the previous 5 years. Ex. 7 at 7. The individual certified that his answers were true. Ex. 7 at 9. DOE granted the individual a clearance in 1992. PSI at 32.

During the course of his employment at the DOE site, the individual completed additional documents during periodic re-investigations. In May 1995, he signed a QSP, certified that his answers were true, and then denied any drug-related arrest. Ex. 8. He did the same on a QNSP in August 1996 and an electronic Questionnaire for Investigations Processing in December 2006. Ex. 9, 10. However, during the 2006 re-investigation, DOE discovered that the individual had been arrested in August 1987 on a drug-related charge. In August 2007, DOE suspended the individual's clearance. Ex. 1. DOE asked the individual to answer certain questions in a Letter of Interrogatory (LOI). The individual responded to the LOI in October 2007, and then responded to further written questions in November 2007. Ex. 11 (LOI); PSI at 36. On the LOI, the individual stated that he had been arrested in

² The Statement of Charges indicates that the individual was arrested in August 1987. Ex. 3 at 5. He also stated in the PSI that he was arrested in August 1987. PSI at 6. However, in his response to the LOI, the individual stated that he was arrested in 1986. See Ex. 11 at 1.

August 1986 while under the influence of alcohol and amphetamines. Ex. 11 at 1. He also certified that had never used marijuana or cocaine. LOI at 3.

DOE conducted a PSI with the individual in January 2008. During the PSI, the individual admitted that he had lied on his security forms in order to get the job, and that he maintained the falsification in order to keep his job. PSI at 39. He also admitted that he knew that he had inhaled cocaine on the night of his arrest. *Id.* at 39.

B. DOE's Security Concerns

The LSO invoked Criterion F because the individual did not disclose his use of illegal drugs or a drug-related arrest, and also because the individual deliberately provided false information to DOE. There are substantial security concerns when an individual is not forthcoming with security personnel. "Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information." See Attachment to Memorandum from Assistant to the President for National Security Affairs, "Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information," at ¶15 (December 29, 2005) (Guidelines). The individual admits that he did not disclose his drug use or drug-related arrest on the security form. Thus, I find that the security concern is warranted.

C. Hearing Testimony

1. The Individual

The individual testified that he had used cocaine occasionally until his arrest in August 1987, an event he described as a humiliating experience. Tr. at 54. After the arrest, he was jailed for a few hours, paid a fine, attended a court-ordered class and was placed on probation. Tr. at 67. He maintained that he has not used illegal drugs since the night of his arrest.

In 1991, the individual applied for a job with a DOE contractor that required a security clearance. He applied for the job in order to move near his first wife. She had moved to another state to attend graduate school and left him behind with his young son. He requested a copy of his police record during the application process, and the report had no mention of his arrest. Tr. at 72. At the hearing, the individual admitted that he did not disclose the arrest in his security paperwork because of his great desire to reunite his family. *Id.* at 58, 62, 73.

During the individual's employment with the contractor, he completed additional security questionnaires. His arrest record was never an issue until the latest investigation. Tr. at 64. He testified that during his employment, he was embarrassed by and in denial about the arrest. *Id.* at 69. He felt that he had to maintain his original declarations and therefore continued the lie throughout his employment, most recently in his responses to the October 2007 LOI. *Id.* at 70.

The individual testified that he recently sought counseling with a local psychologist in order to understand why he had lied on his security forms.³ After the PSI, he was “shattered” and the psychologist helped him put events in their proper perspective. He knows that he should have disclosed his arrest even though it was expunged. Tr. at 63. He regrets that the government does not trust him and admits that he did not take the clearance process seriously enough. However, since the administrative review process began, he has disclosed the incident to many people.

2. Character Witnesses

The individual offered the testimony of four character witnesses—his supervisor, two colleagues, and his current wife.⁴

The supervisor has known the individual for 11 years, saw him daily at work, and considered the individual to be honest, a hard worker and a person of high integrity. The supervisor learned of the arrest in early 2008. *Id.* at 8-14.

The first colleague testified that he knew the individual for almost 10 years, and saw him three to four days a week. *Id.* at 18. The colleague considered the individual to be a very thorough, trustworthy, and religious person. He also described the individual as remorseful about the falsification. However, the colleague maintained that the individual was not vulnerable to blackmail because the individual had discussed his arrest with many people. The witness first learned of the arrest in 2007. *Id.* at 18-23.

The second colleague testified that he has known the individual for 12 years, and for three years they shared the same office space. *Id.* at 24-26. They have had some social contact and he has personally observed the individual’s honesty and dependability. Approximately five years prior to the hearing, the individual told the witness about his arrest. During the conversation, the individual maintained that he was not required to disclose the arrest to the LSO because the individual believed that an expungement was the equivalent of never having been arrested. However, the witness, who also holds a security clearance, encouraged the individual to disclose his arrest to the LSO. The individual has admitted to the witness that he now realizes he made a mistake by hiding his arrest. *Id.* at 24-32.

³ The individual submitted a report completed by a clinical psychologist who had conducted five sessions with the individual between May and October 2008. Ex. B. The psychologist administered two psychological tests—the “Personality Assessment Inventory,” a measure of psychological and psychiatric symptoms, and the “Neuroticism-Extroversion-Openness Personality Inventory-Revised,” a comprehensive inventory of personality traits and styles. *Id.* at 1. The psychologist explained that several factors contributed to the individual’s initial falsification, including humiliation, denial, and motivation to reunite his family. The individual also believed that because DOE continually renewed his clearance, his arrest record no longer existed. Ex. B at 4. The psychologist concluded that the individual has “come to grips with his sense of guilt and shame,” his stress is reduced, and he shows no evidence of “substance abuse, narcissistic, manipulative, irresponsible, or exploitative traits or behavior.” Ex B at 4. He concluded that the individual is responsible, trustworthy, and dependable. *Id.*

⁴ The individual also submitted 17 letters of support from friends and family. Ex. A. All of these letters described the individual as trustworthy, honest, and dependable.

A former neighbor of the individual also testified. This witness met the individual 10 years ago, and described him as a good person and a family man who is also active in his community. Tr. at 34-35. He also described the individual as an honest, reliable person with good judgment. The individual told him about the arrest one year ago. *Id.* at 36.

The individual's current wife has been married to the individual for 15 years and they have two children together. She described her husband as trustworthy, loyal, and loving. Tr. at 39-40. According to the wife, she knew about the arrest prior to DOE's discovery. *Id.* at 41. She stated that her husband considered the arrest a "wake up call" that made him stop using drugs and change his lifestyle. *Id.* To her knowledge, he has never used drugs since the arrest. *Id.* at 41. The individual has experienced depression and anxiety for a year since his clearance was under review. He had difficulty concentrating, but he is relieved that the issue is now disclosed and willing to take ownership of his actions. He has disclosed the arrest to his parents and his son, who is a college student. *Id.* at 41-42. He is unhappy that the government does not trust him. *Id.* at 44. Sessions with a psychologist have helped him to cope.

The individual's wife also discussed the falsification of the individual's security documents. According to the wife, the individual believed that he did not have to disclose his expungement. Tr. at 45. He signed the form in order to keep his family together, and then felt he had to be consistent. The wife testified that she does not remember any specific conversations about his security paperwork in 1995 or 1996, and she never looked at his QNSP forms. *Id.* at 47. Nonetheless, she knew that he falsely denied ever using drugs in his October 2007 LOI. He has taken steps to prevent blackmail by disclosing the arrest to friends and family. *Id.* at 50.

D. Mitigation of Security Concerns

The concern in Criterion F arises from the individual's allegedly deliberate omission of past drug use and a drug-related arrest on his security questionnaires. Hearing Officers have considered several factors in cases involving falsification including whether the individual came forward voluntarily to renounce the falsifications, *compare Personnel Security Hearing*, Case No. VSO-0037 (1996) (voluntary disclosure by the individual) *with Personnel Security Hearing*, Case No. VSO-0327 (2000), *affirmed* (OSA, 2000) (falsification discovered by DOE security); the length of time the falsehood was maintained, and whether a pattern of falsification is evident, *see Personnel Security Hearing*, Case No. TSO-0394(2006) (finding that pattern of falsification precludes mitigation of Criterion F concern). *See also Personnel Security Hearing*, Case No. TSO-0625 (2008); *Personnel Security Hearing*, Case No. VSO-0441 (2001) (finding that voluntary disclosure of drug use mitigated Criterion F security concern).

The individual presented character witnesses, letters of support and a psychological report as evidence of mitigation of the security concern. His witnesses testified about his good character, and he seems to be a mature, responsible person who is well-respected by his colleagues and neighbors. In the years since his arrest, it is clear that the individual has matured and is not the same person as the occasional drug user who was arrested over 20 years ago. There is evidence in the record that the individual has acknowledged his

behavior and obtained counseling to change that behavior. Guideline E, ¶ 17 (d). The individual also took positive steps to alleviate the circumstances that caused his behavior, i.e. he stopped taking drugs and discontinued his association with drug users. Guideline E, ¶ 17 (g); PSI at 16-17, 23-24. He also took positive steps to eliminate any vulnerability to exploitation or manipulation by disclosing his arrest to family and friends. Guideline E, ¶ 17 (e).

Notwithstanding the information above, I find that the individual has not fully mitigated the security concerns under Criterion F. First, the individual did not voluntarily disclose his falsification. He withheld that information from DOE over a 16-year period, from the initial questionnaire in 1991 through 2007 when he denied using cocaine. The individual admitted that he intentionally withheld the information from DOE in order to get, and then keep his job. Thus, there is no evidence in the record that the individual would have reported the derogatory information voluntarily. Second, the individual lied multiple times – from 1991 to 2007--displaying a pattern of withholding the truth during the security process. See Guideline E, ¶ 17 (c) (security concern mitigated if behavior did *not* occur frequently). Third, the falsifications are recent. The individual committed his last falsification in October 2007, one year prior to the hearing, when he denied using cocaine. See Guideline E, ¶ 17 (c) (security concern mitigated if behavior is *not* recent). Thus, when I measure the 16-year period of deception against the one year period that the individual has comported himself in an upright manner, I conclude that not enough time has passed to establish a pattern of honesty. Fourth, during the 16-year period that the individual maintained the falsehood, he was vulnerable to blackmail, pressure or coercion. Finally, during the period that the individual maintained the falsification, he was a mature adult and had held a clearance for many years. See *Personnel Security Hearing*, Case No. TSO-0415 (2007). He had many opportunities during that time to disclose the truth to the LSO, and was well aware of the consequences of non-disclosure. Despite that knowledge, even after DOE discovered that the individual had lied about his arrest, the individual deliberately lied again on his response to the LOI in October 2007, and denied ever using cocaine.

In summary, I conclude that there is insufficient evidence in the record to mitigate the security concerns under Criterion F surrounding the individual's falsification of his security forms.

III. Conclusion

As explained in this Decision, I find that the DOE Operations Office properly invoked 10 C.F.R. § 710.8 (f). The individual has not fully mitigated the legitimate security concerns of DOE security as regards Criteria F. Thus, in view of the criterion and the record before me, I cannot find that restoring the individual's access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I find that the individual's access authorization should not be restored at this

time. Any party may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Valerie Vance Adeyeye
Hearing Officer
Office of Hearings and Appeals

Date: January 9, 2009